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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY RAYNAIL WILLIAMS, Defendant and Appellant.	A104015 (Solano County Super. Ct. No. VC 45190)
In re ANTHONY RAYNAIL WILLIAMS on Habeas Corpus	A107704

Anthony Raynail Williams (appellant) seeks reversal of his three convictions for felony false imprisonment on numerous grounds, and relief by petition for writ of habeas corpus as well. We affirm his convictions and sentences in their entirety, and deny his petition.

BACKGROUND

The Solano County District Attorney, by second amended information filed on March 11, 2002,[1] charged appellant with three counts of felony false imprisonment regarding a woman, "C.W.," and her daughter and her granddaughter, referred to herein

[1] Appellant failed to appear for his originally scheduled trial in 1999, and a bench warrant for his arrest was issued. On March 5, 2001, he was arrested, apparently because of a parole violation regarding another matter, and incarcerated.

as P. and N. The information also alleged that appellant used a deadly weapon to falsely imprison C.W., charged him with a fourth count of burglary of C.W.'s home, and alleged that appellant had nine prior "strike" convictions stemming from two previous cases.

After a procedural controversy that we address further in our discussion section below, appellant's jury trial began on March 12, 2003. C.W. testified that on October 18, 1995, at approximately 3:00 p.m., appellant, an acquaintance of C.W. who had been to her Vallejo home previously, knocked on her door and, when she opened it, pushed his way in. He told C.W. he wanted some water, brought his bicycle inside and locked the door behind him.

C.W. testified that she gave appellant a glass of water and then, feeling increasingly uncomfortable, began running to her bedroom in order to leave the house through a door in that room. Appellant chased after her, pushed her down on her bed, slapped her and started choking her. He said he had a gun and a knife and threatened to "cut [her] up." C.W. saw a handle and a little bit of the blade of what she thought was a kitchen knife in appellant's back pocket. Scared, she lay on her bed praying while appellant held her down and pressed himself against her for a few seconds. Appellant then stood up and told C.W. that he was going to tie her up, proceeded to tie up her mouth, wrists and ankles, and picked her up and laid her on the bedroom floor in front of her bathroom.

While C.W. was on the floor, appellant picked up a Bible in the room and said, "This is the Lord's house. Nothing's not going to happen to you in this house." He told her that if she was quiet and cooperated with him, he would not do anything to her. A short time later he also told her, "Lord must be in me. I can't hurt you if I wanted to."

C.W. testified that she heard a knock on the door 35 to 40 minutes after she had been in the bedroom. P. and N., then both eight years old, came into the bedroom a few moments later, looked at C.W., and began to cry. Appellant told them he was just going to tie them up and was not going to hurt them, and tied up their wrists and feet with shoestrings. He told N., "Oh, pretty eyes. You're so pretty." He had the girls lay on the floor next to C.W., where P. at one point was "kind of kicking with her leg." Appellant

"stepped on [her] leg to make her be still." The three stayed on the floor of the bedroom, tied up, until about 7:00 p.m. that day.

C.W. recalled that someone knocked on the front door of the house around 4:30 p.m. and appellant went out of the room, then returned and described two people that C.W. thought were her adult son Derrick and his girlfriend Anna. Appellant did not answer the door. Around 7:00 p.m., appellant untied C.W., P. and N., apologized and started to cry. A few minutes later, appellant answered a knock at the front door. Derrick was at the door and came into the house; after Derrick greeted him, appellant dashed out the door with his bicycle. C.W., P., and N. told her son what happened, and Derrick went to a neighbor's house to call the police. The police came to the house and C.W. told them what appellant had done.

Among others, P. and N. also testified for the prosecution. C.W.'s daughter P., age 16 at the time of the 2003 trial, testified that her mother did not pick up N. and her from school as they expected on October 18, 1995, so they walked home, taking about half an hour, and knocked on the door. Appellant, whom P. had met before, opened the door and told them that C.W. was in the back bedroom. The two young girls walked to the bedroom, where P. testified she saw her mother "laid out and tied up on the floor" near the entrance to a bathroom. P. was shocked, and she and N. started crying. Appellant then tied up the girls' legs and hands with shoestrings or shoelaces of some kind. She recalled that appellant was jumpy, going in and out of the bedroom, and had a "sharp kitchen knife" somewhere in his clothes. She recalled a knock on the door and appellant coming back and describing her brother Derrick and his girlfriend Anna, and that Derrick came by a second time after that.

P. testified that appellant started to cry at some point and say he was sorry, and untied them, cutting the shoelaces that bound them with his knife. Her brother Derrick came to the house 10 or 15 minutes after that and appellant left quickly with his bicycle. They told Derrick and Anna what happened, and P. recalls her mother and Derrick calling the police together on Derrick's cell phone. The police arrived later that night and asked them questions.

C.W.'s granddaughter N., also age 16 at the time of trial, testified that she walked home with P. after they got out of school at around 3:00 p.m., because her grandmother did not pick them up; that the walk took about 30 minutes; that appellant, whom she had met two or three times before, answered the door and directed the girls to the back room, where she found her grandmother tied up and lying on the floor by the bathroom; that she and P. started crying, that appellant tied them up with shoestrings; that he told them it was going to be all right and was fidgety; that he had a kitchen knife in his pocket; that someone came to the door and appellant, after looking to see who it was, described Derrick; that there was another knock on the door sometime later; and that appellant later untied them, cutting off the bindings on their feet. Shortly after they were untied, at about 7:00 p.m., Derrick came to the house and appellant rushed out of the house with his bicycle. C.W., P. and N. told Derrick what happened and he got mad and punched a wall. He went out and tried to look for appellant, then came back. Anna also came into the house, and one of them called the police. N. thought that they all went in a car to look for the appellant. The police came to the house and spoke to them, but she could not recall when.

Appellant did not testify. Instead, along with his counsel's rigorous cross-examination of the prosecution witnesses about inconsistencies in their testimony, appellant presented as evidence, among other things, the testimony of his wife and his mother, apparently to suggest that he was not at C.W.'s house *at all* in the late afternoon and early evening of October 18, 1995.

Appellant's wife, Gail Williams, testified that on the date in question, October 18, 1995, she went to dinner with appellant at about 5:00 p.m. to celebrate their wedding anniversary and as part of their effort to patch together their troubled relationship, although she could not recall where they went specifically. She also testified that appellant left for Sacramento the next day, and that she has not had a relationship with him since that time. On cross-examination, she testified that she did not recall telling a police investigator in January 1996 that she had not talked with her husband since the previous September.

Appellant's mother, Goldina Hickerson, testified that she answered a telephone call to her daughter's home in 1995 from a woman who identified herself as "Carnell," and that her son told her later that she was his girlfriend. She also testified that she took messages for her son from a woman named Carnell in 1995 during a two to three month period "through September/October," testifying that at one point Carnell called "like 24/7." Hickerson also stated that she called the appellant a little after 4:00 p.m. on October 18, 1995, his wedding anniversary, to ask him if he went back to his wife Gail. Hickerson stated that appellant told her during that telephone call that he had "broke it off with Carnell and he was taking his wife out for dinner that night." Hickerson was sure of the timing of the call, because she had "fussed" at the appellant about Carnell.

Appellant's sister, Thelma Sadler, also testified that she received telephone messages on her brother's behalf at some point in 1995 four to five times a week from a woman known to her as "Carmen," who at some point accused appellant of tying her up and later called to apologize.

Along with presenting appellant's wife's testimony that appellant was with her starting from around 5:00 p.m. on October 18, 1995, appellant's counsel argued that appellant *was* at C.W.'s house when Derrick arrived in the early evening of October 18, 1995, but only to break off a relationship he was having with C.W. in order to return to his wife. Appellant relied on portions of Hickerson and Sadler's testimony to contend he had been involved with C.W.[2] Appellant also relied on C.W.'s testimony that she had some sort of continuing relationship with her ex-husband, Otto W., who was in prison as of October 1995, and became involved with him again after October of 1995.[3] According

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[2] Appellant also called a woman to the stand who testified that, as part of her interest in appellant during the summer of 1995, she followed appellant, and observed him at times in the area around C.W.'s house, and one time saw him come out of a house that the evidence suggested was C.W.'s house. Her testimony was not necessarily inconsistent with C.W.'s testimony that she was acquainted with appellant, and that he had come to her house before October 18, 1995.

[3] Although appellant suggests in his appellate brief that Otto W. stayed with C.W. at her house sometime in October 1995, the record does not support this contention. C.W.

to appellant, C.W. hid the true reason for appellant's presence in her house from Derrick by making up appellant's attack and persuading P. and N. to lie in the moments after Derrick's arrival at her home on October 18, 1995, apparently fearing that Derrick would tell a jealous Otto W. that she was seeing someone else. C.W., appellant's counsel argued in his closing, was engaged in a "big lie." Appellant relied heavily on this argument despite undisputed testimony indicating that Derrick was C.W.'s son, but that he was *not* Otto W.'s son and was not close to Otto W.

As a part of his defense, appellant sought to undermine C.W.'s credibility by introducing evidence that Otto W. was a convicted sex offender and molester, purportedly of P., and was prohibited by his parole conditions from having any contact with P. Appellant's counsel argued that C.W., by resuming a relationship with Otto W. and allowing him to have contact with P., engaged in acts of "moral turpitude" that showed her willingness to encourage P. and N. to lie and ignore her own testimonial oath to tell the truth.

The trial court ruled that appellant's counsel could ask C.W. about her relationship with Otto W. However, the court ruled that he could not cross-examine regarding Otto W.'s child molestation conviction and parole conditions, indicating that the evidence proffered was not substantive enough, that C.W.'s seeing him regardless of his parole conditions was not illegal, and that the evidence was not terribly relevant.

Appellant's counsel subsequently asked questions about C.W.'s relationship with Otto W., as did the prosecution. Along with testimony already referred to above, the

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testified that she and Otto W. had divorced in the early 1990's, and other family members testified that Otto W. was not around the house in October 1995. Appellant also augmented the record on appeal, pursuant to our March 12, 2004 order granting his motion to do so, with documents indicating Otto W. was sentenced to three years in prison on June 8, 1995, and was released from prison in February 26, 1997. The only evidence that indicated Otto W. was at the house in October 1995 was P.'s affirmative response to the question, "Were you there in October '95 when Otto Watson was there?" However, P. had a few moments before clearly stated that Otto W. was not present at the house in October 1995.

record indicates that Derrick indicated that the two were married at the time of trial. Specifically, Derrick testified on direct examination as follows:

"Q. Are you familiar with Otto [W.]?

"A. Yes.

"Q. And who is he?

"A. That is my mom's husband."

On March 19, 2003, the jury found appellant guilty of each of the felony false imprisonment counts, but found the arming allegation to be untrue and the appellant to be not guilty of burglary.

Appellant waived his right to a jury trial regarding respondent's prior "strike" allegations, which were bifurcated from the other charges. On March 21, 2003, the trial court, after trial, found that the defendant had suffered each of the prior convictions alleged in the second amended complaint. On July 31, 2003, the trial court sentenced appellant to three 25 years-to-life terms, with the sentences for counts 2 and 3 to run concurrently. Appellant filed a timely notice of appeal on August 13, 2003.

After filing his appellate papers, appellant also filed a petition for writ of habeas corpus seeking release because he was denied his constitutional rights to effective assistance of counsel and due process, ~ (PWHC 25-40)~ which petition we consider with this appeal pursuant to our order dated September 17, 2004.

DISCUSSION

A. The Trial Court Properly Denied Appellant's Motion to Dismiss for Failure to Provide a Speedy Trial

Before his trial, appellant moved to dismiss this action on procedural grounds, arguing that his state statutory and federal due process rights were violated when his trial date was set beyond the deadline provided for in Penal Code section 1381.[4] The court denied his motion, a ruling which appellant contends was erroneous, as well as

[4] All statutory references herein are to the Penal Code unless otherwise stated.

prejudicial because respondent would not have been able to refile charges against him under the applicable statute of limitations. Appellant is incorrect on both counts.

Section 1381 provides that, under certain circumstances, a person already incarcerated is entitled to trial regarding another offense within 90 days after that person's delivery of written notice to the district attorney of the place of his or her imprisonment or confinement and desire for a trial within 90 days. Appellant contends the Solano County District Attorney received such a written demand from him on December 19, 2001.[5]

Apparently, the Solano County authorities lost track of appellant's status after receiving his written demand, and he remained in the custody of Alameda County authorities for trial on another charge from February 14, 2002, to June 17, 2002. Appellant personally filed a one-page motion to dismiss with the Solano County Superior Court on April 24, 2002, for the purported failure to set trial for within 90 days of his section 1381 demand, but nothing in the record indicates that he pursued this motion further at that time.

On June 24, 2002, the trial court held a trial-setting hearing in this matter. Appellant's counsel, Mr. Firpo, prior to the arrival of appellant or respondent's attorney, Ms. Stashyn, told the court that appellant had a section 1381 demand on file, that he did not want to "jeopardize that," and suggested an August 12, 2002, trial date. Later, with all parties present, Mr. Firpo stated to the court, "We think we have to try it within 60, so we're targeting, I think the 6th." He did not mention appellant's motion to dismiss. The court then stated:

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[5] Respondent conceded below that appellant made a section 1381 demand, though the date the district attorney received it is not established in the record. For the purposes of argument, we assume that the district attorney received it as appellant contends on December 19, 2001.

"THE COURT: All right. So according to my calculations, then supposed to start trial by the 19th of August. That would be sixty days. But we certainly don't want to back up like that. [¶] What date do you want to set this matter for trial, Ms. Stashyn?

"MS. STASHYN: The 6th was acceptable for my calendar because I'm going to be gone part of July.

"THE COURT: Okay. I'm more than happy to set it for the 6th. . . . [W]e'll go ahead and put it down on a no-time-waiver basis to start at 8:30 in a department yet to be determined. But it'll be on my calendar for the 6th of August."

Appellant moved on July 12, 2002, to dismiss the action for failure to start trial within section 1381's time limits, which motion was scheduled to be heard on August 2, 2002. After respondent correctly pointed out in its opposition that the 90-day period had been tolled during the time appellant was in Alameda County, pursuant to *People v. Boggs* (1985) 166 Cal.App.3d 851, appellant argued that even with the tolling period taken into account, his trial should have been set for no later than July 27, 2002. Appellant argues on appeal that he could so move because he had not waived his right to object to the time of trial, as reflected in the court's statement at hearing that the trial date was being set "on a no-time waiver basis."

On August 2, 2002, the court denied appellant's motion, relying on *People v. Lenschmidt* (1980) 103 Cal.App.3d 393, 396 (*Lenschmidt*), an opinion issued by our district, in which the court held that a defendant has a duty to protect his right to a speedy trial by objecting when his trial is set for a date beyond the section 1381 deadline. The trial court also indicated that respondent could refile the action, in effect indicating that appellant was not prejudiced in any event.

The trial court correctly relied on *Lenschmidt* to deny appellant's motion to dismiss. The *Lenschmidt* defendant was arraigned 49 days after he had served the district attorney with a section 1381 demand, at which time his trial was set to start eight days after the 90-day period was to expire. (*Lenschmidt, supra,* 103 Cal.App.3d at p. 395.) The trial court subsequently granted the defendant's motion to dismiss pursuant to section 1381. (*Ibid.*) The appellate court reversed this ruling on the ground that the defendant

had waived his section 1381 rights by not objecting to the improper trial date, noting that "section 1381 requires a defendant to protect his right to speedy trial by speaking up when a date set for trial infringes on that right. Neither inadvertence nor gamesmanship dissipates that duty." (*Lenschmidt, supra,*103 Cal.App.3d at p. 397.)

Lenschmidt's holding applies here as well. Indeed, the facts here are even more compelling. Appellant, although he had filed a motion to dismiss prior to the June 24, 2002, hearing did not mention his motion and made no objection to the trial dates discussed. To the contrary, he, through his own counsel, proposed the trial date he later objected to, made statements indicating that he understood the trial date was within the allowable statutory time period, and filed a motion that was to be heard only after the statutory deadline expired. Whether appellant's actions were a result of inadvertence of gamesmanship, the sound rule articulated in *Lenschmidt* controls. Appellant's counsel, by his own proposal of, and representations about, the trial date set by the court, waived any section 1381 rights appellant might have otherwise had.

Appellant attempts to distinguish *Lenschmidt* by noting that in that case, no one informed the court of the existence of a section 1381 demand while here, his counsel supposedly did so, but erred and suggested the "wrong date for trial setting." Appellant fails to explain why this distinction matters in light of *Lenschmidt*'s explicit declaration that inadvertence does not excuse a party's actions regarding the trial date.

Appellant relies on another case also issued by our district, *Vukman v. Superior Court* (1981) 116 Cal.App.3d 341, 348, footnote 2 (*Vukman*), overruled on other grounds in *People v. Cuevas* (1995) 12 Cal.4th 252, 275, footnote 5. In *Vukman,* the appellate court held that the trial court erred in denying a motion to dismiss brought pursuant to section 1381. However, as respondent notes, that case is inapposite because it involved a defendant's failure to object to a trial date set at a hearing that occurred *after* the section 1381 time period had already expired; indeed, the *Vukman* court distinguished its facts from those in *Lenschmidt* on this very basis. *(Id*. at p. 348.)

Appellant cites dicta in *Vukman* that questions *Lenschmidt* to the extent it allows section 1381 rights to be waived by silence at a trial setting hearing, given that section

1381 states that trial occur 90 days after demand " 'unless a continuance is requested or consented to by [the incarcerated defendant], in open court, and such request or consent entered upon the minutes of the court . . . .' " (*Id*. at pp. 348-349, fn. 2.) However, the *Vukman* court made clear that it was not answering the question it raised. (*Ibid.*) Accordingly, *Lenschmidt* remains the controlling authority on the issue.

In light of our holding that the trial court correctly denied appellant's motion to dismiss, we need not address the second issue debated between the parties, namely whether appellant was somehow prejudiced by the trial court's purportedly incorrect ruling. We do so briefly, however, to address appellant's contention that the district attorney would not have been able to refile charges against him because the applicable statute of limitations period had run. This is not correct. Both parties agree that a three-year statute of limitations period applied here. Respondent alleged that appellant committed his criminal acts on October 18, 1995. For purposes of statute of limitations analysis, a prosecution begins with the issuance of an arrest warrant (Pen. Code, § 804, subd. (d)), which the record indicates was issued here on January 12, 1996, less than three months after the three-year statute of limitations period began to run. Clearly, then, respondent had time to refile its charges if the court had granted appellant's motion to dismiss,[6] and appellant, therefore, suffered no cognizable prejudice by any purported error. (Pen. Code, § 1387, subd. (a); *Crockett v. Superior Court* (1975) 14 Cal.3d 433, 437.)

The trial court properly denied appellant's motion to dismiss. We turn then to the issues appellant raises regarding his trial and sentencing.

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[6] Even if this warrant had not commenced the action, a filing of an information may commence a case (Pen. Code, § 804, subd. (a)), and would toll any statute of limitations. (*People v. Whitfield* (1993) 19 Cal.App.4th 1652, 1659.) The original information in this action was filed on December 3, 1997.

B. Appellant's Felony False Imprisonment Convictions Regarding P. and N. Are Supported by Substantial Evidence

Appellant contends there was not sufficient evidence to find him guilty of felony false imprisonment of P. and N. "because the prosecution failed to present substantial evidence of the essential elements of violence or menace." Appellant is incorrect.

We review a claim that evidence is insufficient to support a conviction by determining whether the entire record, viewed in the light most favorable to the judgment and presuming the existence of every fact that could reasonably be deduced from the evidence, discloses substantial evidence based upon which a reasonable trier of fact could find each element of the charged offense beyond a reasonable doubt. (*People v. Lee* (1999) 20 Cal.4th 47, 58; see also *People v. Marshall* (1997) 15 Cal.4th 1, 34.) Under a "substantial evidence" standard of review, " ' "an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find [the elements of the crime] beyond a reasonable doubt." ' [Citations.] ' " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' " *(In re George T.* (2004) 33 Cal.4th 620, 631-632.)

False imprisonment is defined in section 236 as "the unlawful violation of the personal liberty of another." "[T]he essential element of false imprisonment is restraint of the person. Any exercise of express or implied force which compels another person to remain where he does not wish to remain, or to go where he does not wish to go, is false imprisonment." (*People v. Bamba* (1997) 58 Cal.App.4th 1113, 1123.) Section 237 provides that a false imprisonment offense is punishable as a felony if it is effected by "violence, menace, fraud, or deceit." " '[V]iolence' means ' "the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint." ' " (*Ibid*.) " '[M]enace' means ' "a threat of harm express or implied by word or by act." ' " (*Id.* at 1123.)

When young children are the victims, a person does not have to use violence or menace directed at the children to be found guilty of felony false imprisonment. (*People v. Rios* (1986) 177 Cal.App.3d 445, 450 (*Rios*).) *Rios,* discussed favorably by our Supreme Court in *In re Michelle D.* (2002) 29 Cal.4th 600, 608-609, affirmed the felony false imprisonment conviction of a father who abducted his infant daughter by deceiving his ex-wife. (*Rios, supra,* at p. 448-449.) The father, although he did not challenge that he had falsely imprisoned the infant, contended his crime was a misdemeanor because he did not force, menace, defraud or deceive the infant. (*Id.* at p. 450.) The appellate court disagreed, stating, "for the purpose of a felony false imprisonment conviction under sections 236 and 237, when the victim is a child of tender years, is it sufficient if the crime is 'effected' by 'violence, menace, fraud, or deceit' directed to the custodial parent rather than the child herself." The court's analysis was based on the fact that "nowhere in section 236 or 237 does it state that the 'violence, menace, fraud, or deceit' must be committed against the victim herself. The statutes merely state in general terms that the crime of felony false imprisonment must be 'effected' by one of these elements. Appellant's interpretation of that provision would have the effect of narrowing its applicability in a way that the language itself does not warrant. As a rule, '[I]n construing the statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language. The court is limited to the intention expressed.' " (*Id.* at pp. 450-451.)[7]

[7] Furthermore, the Legislature revised section 237 in 1998 and 1999, after *Rios* was decided. The Legislature continued to use virtually the same phrasing, as section 237 presently states in relevant part, "If the false imprisonment *be effected by violence menace, fraud, or deceit*, it shall be punishable by imprisonment in the state prison." (§ 237, subd. (a), italics added; compare *Rios, supra,* 177 Cal.App.3d at p. 447, fn. 2.) Under an established rule of statutory construction, we must presume that the Legislature thereby accepted and ratified *Rios*'s prior judicial construction. (See *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 907.)

With these rules in mind, we conclude that there was substantial evidence that appellant used violence and menace over and above that necessary to effect the false imprisonment of P. and N. First, there was substantial evidence that appellant's false imprisonment of P. and N. was "effected" by his use of violence and menace against C.W. C.W. testified that appellant hit her, shoved her, threatened to "cut [her] up," laid on top of her and, after tying her up, requiring her to lie prone on her bedroom floor. P. and N. were both eight-years old, a tender age by any reasonable standard. (*See People v. Olsen* (1984) 36 Cal.3d 638, 646 [discussion indicating children under the age of 14 are of "tender years"]; *Pamela L. v. Farmer* (1980) 112 Cal.App.3d 206, 211 [girls ages 11, 12, and 13 characterized as being of "tender years"].) They were in C.W.'s custodial care, and were overwhelmed when they found C.W. tied up and lying on her bedroom floor, both immediately bursting into tears. Appellant tied them both up and caused them to lie prone on the bedroom floor while they were in this state of mind.

Indeed, there is substantial evidence that when the girls came to the door of the house, appellant left C.W. tied up, gagged and lying prone on the floor, and then directed the girls to the back bedroom to see her in this state, thereby menacing P. and N. P. testified that when appellant opened the door of the house, she and N. asked appellant where C.W. was, he told them she was in the back room without saying another word, and he then walked directly behind them as the girls went to that room, where he promptly tied them up after they observed C.W. and burst into tears. It can be inferred from this testimony that appellant knew full well that he was menacing the two eight-year-old girls by exposing them to the shocking sight of C.W. in her victimized state. In short, the jury reasonably could have concluded that appellant's actions menaced the girls and effected their restraint.

There were other acts of violence and menace against the girls as well. Respondent contended at trial and upon appeal that appellant's tying up of the children's hands and feet was an act of violence supporting appellant's felony convictions. Appellant contends this view eviscerates the difference between the force necessary for misdemeanor false imprisonment and the additional violence needed for felony false

imprisonment, relying principally on discussions in *People v. Matian* (1995) 35 Cal.App.4th 480, and *People v. Babich* (1993) 14 Cal.App.4th 801, about what particular acts and statements constituted sufficient evidence of violence or menace. However, these cases do not contradict the law which guides us here, that being if there is substantial evidence of a minimal quantum of force over and above that reasonably necessary to effect restraint of the children, we must affirm appellant's felony convictions. (See *People v. Bamba, supra,* 58 Cal.App.4th at p. 1124 [appellant's driving recklessly and above the speed limit, rather than safely and at the speed limit, sufficient to constitute force over and above that reasonably necessary to effect restraint].) There was sufficient reasonable, credible evidence of solid value, from which the jury could conclude beyond a reasonable doubt that appellant's tying up of both the girls' hands and feet involved more force than was reasonably necessary to restrain them, such as the girls' very young ages, their presence in an enclosed area, and their distressed states of mind. For example, the jury could have reasonably concluded that appellant could have bound only their feet and found, therefore, that he employed violence over and above the force necessary to restrain the girls.

The record reveals other substantial evidence supporting appellant's felony convictions as well. C.W. testified that after P. was lying on the floor, appellant stepped on P.'s legs in order to stop her from kicking her leg, when he could have simply moved away. Appellant also told N. that she was pretty and had pretty eyes, which the jury could have reasonably concluded menaced N., since it was said to an eight-year-old girl not by a friend, but by a man with a knife sticking out of his pocket who had tied up and gagged the girl's grandmother and now sought to tie her up as well.

In short, there was substantial evidence that appellant's false imprisonment of P. and N. was effected by violence beyond that reasonably necessary to restrain them, and

by menace. Therefore, we reject appellant's claim that there was insufficient evidence to justify his felony false imprisonment conviction.[8]

C. The Trial Court Did Not Violate Appellant's Federal Constitutional Rights Regarding Cross-Examination By Excluding Evidence of Otto W.'s Criminal Record

Appellant argues that the trial court violated his federal due process and Sixth Amendment rights by denying his requests, made in a motion in limine and during the trial, that evidence be admitted about Otto W.'s conviction for child molestation, purportedly of P., and the conditions of a parole that did not allow him contact with P. Appellant contended that by allowing Otto W. into her home in the course of their continuing relationship, testimony of which the court did allow, C.W. engaged in an "affirmative act of child endangerment and thus evinced moral turpitude." According to appellant, this "moral turpitude" showed that C.W. "was not only capable of fabricating her accusations against appellant, but was also capable of influencing P. and N. to do so, an act which would necessarily involve taking advantage of P's and N's childhood trust of their caretaker." Therefore, appellant contends, his convictions must be reversed. We reject appellant's strained contentions in their entirety.

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial has broad discretion in determining the relevance of evidence, and its ruling will not be disturbed absent a showing of an abuse of that discretion. (*People v. Smithey* (1999) 20 Cal.4th 936, 973; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Furthermore, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate

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[8] In light of our ruling, we do not address respondent's argument that appellant detained the victims for a time period too long for a misdemeanor felony imprisonment conviction alone, or appellant's arguments about the need for resentencing upon any reversal of his convictions on counts two and/or three.

undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) It is "unquestionably constitutional" under the United States Constitution for a state to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice or it would confuse or mislead the jury. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 42 (plurality opinion of Scalia, J).)

Under our state system, "[t]he [appellate] standard of review for Evidence Code section 352 challenges is abuse of discretion. 'The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' . . . [¶] On appeal, ' "[a] trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]" ' " (*People v. Vargas* (2001) 91 Cal.App.4th 506, 543.) We may reverse appellant's convictions by reason of the trial court's erroneous exclusion of evidence only if, among other things, we find the error complained of "resulted in a miscarriage of justice." (Evid. Code, § 354.)

Appellant's proffered evidence should have been excluded because, as the trial court noted, it was not substantive enough, i.e., it did not establish that C.W. engaged, if at all, in particularly relevant acts of "moral turpitude." Conduct involving "moral turpitude" includes felony convictions showing "general readiness to do evil" (*People v. Castro* (1985) 38 Cal.3d 301, 314), including instances involving " 'wanton and willful (or "reckless") disregard of the plain dangers of harm without justification, excuse or mitigation.' " (*People v. Campbell* (1994) 23 Cal.App.4th 1488, 1493.) While a felony child endangerment conviction might involve moral turpitude, it does not necessarily because it can be committed "by wholly passive conduct, free from any element of force, violence, threat, fraud, deceit, or stealth . . . ." (*People v. Sanders* (1992) 10 Cal.App.4th 1268, 1274-1275.)

Appellant does not rely on any prior felony conviction of C.W. to make his case. (Compare with *People v. Castro* (1985) 38 Cal.3d 301.) To the contrary, appellant does not demonstrate that his theory was much more than speculation, such as that C.W. allowed Otto W., while on parole, to have contact with P. before October 18, 1995 (when she purportedly first lied, and when she persuaded the children to lie, about appellant's actions), that C.W. knew Otto W.'s parole conditions sufficiently to understand that he was not allowed to have contact with P.,[9] that C.W. had contact with Otto W. in October 1995, or allowed him to live at her house around that time, or even that Otto W. had significant contact with P. Essentially, appellant showed that C.W. had allowed Otto W. to stay with her occasionally for a night or two before October 1995,[10] and threw away a birthday card that appellant had given her, possibly after October 18, 1995, because in part she was concerned that Otto W. would see it. This hardly shows C.W.'s "general readiness to do evil."

Appellant also fails to adequately explain why, if he is correct, the court was *required* to admit the purported acts of moral turpitude, despite its broad discretionary authority pursuant to Evidence Code section 352. He relies heavily, for example, on *People v. Waldecker* (1987) 195 Cal.App.3d 1152 (*Waldecker*). The *Waldecker* court merely held that the trial court improperly declined to exercise its discretion to determine whether a defendant's prior conviction for escaping prison, which involved acts of deceit or stealth, should or should not be admitted into evidence for impeachment purposes.

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[9] Appellant did include documents in the record indicating that C.W. knew that authorities were concerned about Otto W. having contact with minors.

[10] P. testified at trial that Otto W. came back to the house after October 1995 and stayed with her mother, which was consistent with C.W.'s testimony on the subject. P. also answered affirmatively when she was asked, "Were you there in October '95 when Otto . . . was there?" Her response, however, had little bearing on the subject, since other evidence indicates Otto W. was actually in prison in October 1995.

(*Id.* at p. 1159.) It did not require the lower court to introduce this evidence, and therefore is inapposite.[11]

Appellant's federal due process argument that he was denied the right to cross-examine witnesses regarding C.W.'s supposed acts of moral turpitude fails for the same reason. As the case cited by appellant makes clear, "[a]lthough the right of confrontation includes the right to cross-examine adverse witnesses on matters reflecting on their credibility, 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination.' [Citation.] In particular, notwithstanding the confrontation clause, a trial court may restrict cross-examination of an adverse witness on the grounds stated in Evidence Code section 352. [Citation.] A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.)

Appellant also argues that respondent exploited the court's error in failing to allow in the "moral turpitude" evidence by making certain statements in closing argument about C.W.'s credibility and her relationship with Otto W., rendering the error prejudicial. We reject this argument as well because no error occurred.

In short, most of the alleged acts of moral turpitude occurred long after October 18, 1995, had little, if anything, to do with C.W.'s veracity at that date, and demonstrate little, if anything, about her willingness or ability to persuade P. or N. to lie about appellant's actions. On the other hand, their introduction could easily have confused the jury and created undue prejudice against C.W. In any event, the trial court's ruling allowing testimony of C.W.'s continuing relationship with Otto W. while excluding the

[11] Furthermore, the evidence at issue in *Waldecker* was indisputably proven, since it was the basis for a prior conviction, unlike here, and related much more closely to the defendant's credibility than the purported acts involved here.

evidence of his convictions and conditions of parole certainly did not exceed the bounds of reason, nor was it a miscarriage of justice. Therefore, we will not disturb the court's ruling.

D. The Court's Jury Instructions Were Not in Error

Appellant argues that the trial court erred because it did not instruct the jury that (1) pursuant to *People v. Dewberry* (1959) 51 Cal.2d 548 (*Dewberry*), they should convict appellant of a misdemeanor only if they had reasonable doubt as to whether he committed felony or misdemeanor false imprisonment; (2) an essential element of misdemeanor false imprisonment is the use of "force or an express or implied threat of force;" and (3) they needed to agree unanimously about which of the purportedly multiple acts by appellant against C.W. constituted false imprisonment. These arguments are incorrect as well.

Appellant's first two arguments fail because there was not substantial evidence to merit a *Dewberry* instruction at all. Such an instruction is only required when substantial evidence exists to support conviction on the lesser-included offense only. (*Dewberry, supra,* 51 Cal.2d at p. 555.) As appellant notes in his reply brief, this is because the "obligation to instruct on general principles openly and closely connected to the case requires instruction on lesser included offenses *when the evidence raises a question as to whether the lesser or greater offense was committed.*" *People v. Breverman* (1998) 19 Cal.4th 142, 154, italics added.) There was no such evidence in this case.

Appellant did not offer any direct evidence to challenge C.W., P. or N.'s testimony about the extent of his violence and menace on October 18, 1995. Appellant contended instead that C.W., P. and N.'s claims of any bad acts by him were completely fictional. On appeal, appellant argues that substantial evidence was introduced at trial to support reasonable doubt between felony and misdemeanor false imprisonment, pointing to the testimony at trial of Officer Moore, who interviewed C.W. and the children at their home on the evening of October 18, 1995, and prepared a written report, which testimony the jury requested be read back to them during deliberations. Appellant's primary "evidence" is that Officer Moore's report contains inconsistencies with the victim's later

testimony and, specifically, indicates that C.W. told him of the extent of the violence that she described later in her trial testimony. Appellant argues that this report, therefore, indicates he did not act with any force greater than was reasonably necessary to effect the restraint of C.W., P. or N.

Appellant's contention is incorrect, if only because Officer Moore testified about acts that undermine appellant's claim that substantial evidence exists to support a misdemeanor conviction only. According to Officer Moore's testimony, his report states C.W. told him that, among other things, appellant had come up from behind her and hugged her as if he was going to kiss her, told her to get on the floor, saying, "I won't hurt you if you cooperate," and tied her up. She and the children told Officer Moore that when the children had come home that afternoon, appellant had tied them up as well, and the children told him appellant had threatened to tie them up tighter if they moved around or escaped. Officer Moore's testimony indicates his report is largely consistent with the victims' testimony recounted above, and itself provides evidence of violence and menace against the victims sufficient to eliminate any reasonable doubt that appellant's actions constituted felony, rather than misdemeanor, false imprisonment. Appellant's statement to C.W. that he would not hurt her *if* she cooperated was itself sufficient to demonstrate that appellant's restraint of her and the children was effected menace, thereby constituting a firm basis for his felony convictions. (§ 237; *People v. Bamba, supra,* 58 Cal.App.4th at p. 1123; *People v. Rios, supra,* 177 Cal.App.3d at p. 450.) Since there was not substantial evidence creating a reasonable doubt as to whether appellant committed felony or misdemeanor false imprisonment, the trial court did not have to provide a *Dewberry* instruction and its misdemeanor false imprisonment instruction was sufficient.[12]

[12] Given our conclusion, we need not address the various other arguments by the parties regarding these issues, such as whether the jury received sufficient other instruction so as to make a specific *Dewberry* instruction unnecessary.

Appellant also contends the court should have instructed the jury on unanimity with respect to his acts against C.W. because the evidence purportedly showed two possible false imprisonments, when "appellant pushed [C.W.] on the bed, slapped her, and choked her, laid his whole body on top of her as if he was going to kiss her[,] and then got off her; . . ." and when he "tied her up . . . ."

A trial court instructs a jury on unanimity only when (1) there is substantial evidence of separate instances of the charged offense; (2) the jury could reasonably fail to agree unanimously on each of the separate instances; and (3) the prosecutor does not select a particular instance as the basis for defendant's charged crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132, 1134-1135.) As indicated by this standard, a unanimity instruction need no be given when an assailant's acts or part of a "continuous course of conduct." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) All the testimony indicates that appellant's acts leading up to his tying up of C.W. occurred one after the other, within moments of each other, in the same area, and during the same series of exchanges between C.W. and appellant. The only evidence of a "separation" between the two activities noted by appellant is C.W.'s testimony that appellant got off of her, stated, "I am going to tie you up," before doing so. In other words, "the acts are so closely connected that they form part of one and the same transaction, and thus one offense." (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.) Therefore, we reject appellant's argument.

E. Appellant's Ineffective Assistance of Counsel Arguments Are Without Merit

Appellant contends in his appeal and his petition for writ of habeas corpus that his Sixth Amendment right to effective assistance of counsel was violated.

The Sixth Amendment to the United States Constitution "guarantees competent representation by counsel for criminal defendants . . . ." (*Strickland v. Washington* (1984) 466 U.S. 668, 690; *People v. Bonin* (1989) 47 Cal.3d 808, 832.) " 'A defendant claiming ineffective representation bears the burden of proving by a preponderance of the evidence both (1) that counsel's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness, and (2) that there is a reasonable

probability that, but for counsel's unprofessional errors, the result would have been more favorable to defendant, i.e., a probability sufficient to undermine confidence in the outcome.' " (*In re Lucas* (2004) 33 Cal.4th 682, 721; accord *People v. Bryden* (1998) 63 Cal.App.4th 159, 179 [involving a habeas corpus petition].)

Appellant contends that he has suffered three different violations of his Sixth Amendment right to effective assistance of counsel. None of his contentions are persuasive.

1. Appellant's Ineffective Assistance of Counsel Argument Regarding the Setting of the Trial Date

Appellant first argues that he was prejudiced by his trial counsel's purported mistake in agreeing to the August 6, 2002 trial date, because "had defense counsel provided reasonably competent assistance in relation to the Penal Code section 1381 demand, the trial court would have ultimately granted the motion to dismiss appellant's charges following the failure of the prosecution to bring appellant to trial by July 27, 2002." This is not correct.

With regard to ineffective assistance arguments raised on appeal, "[r]eviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal *affirmatively* discloses that counsel has no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581-582 (*Fosselman*), italics added.) "In all other cases the conviction will be affirmed and the defendant relegated to habeas corpus proceedings at which evidence dehors the record may be taken to determine the basis, if any, for counsel's conduct or omission." (*Ibid*.)

The record does not affirmatively show that appellant's counsel did not act regarding the setting of a trial date with tactical purposes in mind. For example, appellant's counsel may have asked for the August 6, 2002 trial date because he wanted additional time to prepare for trial. Also, it is not reasonably probable that, but for appellant's purported mistake, the result would have been more favorable to him. Appellant's motion to dismiss would not have been granted if his counsel had correctly stated the time deadline at the June 24, 2002 hearing; appellant would have simply

received a slightly sooner trial date and nothing more. Therefore, we reject appellant's argument.

2. Appellant's Ineffective Assistance of Counsel Arguments in His Petition for Writ of Habeas Corpus

Appellant next argues in his petition for writ of habeas corpus that he did not receive effective assistance of counsel because his trial counsel (1) failed to investigate and uncover evidence that C.W. and Otto W. were remarried in 1999 and have since lived together with P. and N.; and (2) did not seek jury instructions that would have further distinguished misdemeanor and felony false imprisonment. These arguments also are without merit.

Appellant's "failure to investigate" argument fails because he cannot prove by a preponderance of the evidence either element of the two part-test we must apply here pursuant to *In re Lucas, supra*, 33 Cal.4th at page 721. First, he cannot establish that his trial counsel's investigation into the status of C.W.'s and Otto W.'s relationship was unreasonable. To the contrary, his petition indicates that trial counsel made repeated attempts via his investigator to interview the people living at C.W.'s house about the present status of that relationship, but did not receive any cooperation. Appellant contends his trial counsel should have contacted Otto W.'s ex-wife, Lucille W., from whom appellate counsel discovered the remarriage. However, as appellant indicates in his petition, trial counsel made an informed tactical choice with the range of reasonable competence not to pursue contacting Lucille W. after reviewing records that led him to believe she might not cooperate with him. (See *People v. Bryden, supra,* 63 Cal.App.4th 159, 179 [" 'where the record shows that counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed' "].)

Second, it is not reasonably probable that appellant would have received a more favorable result if his trial counsel had pursued his investigation. Among other things, his petition concedes that C.W.'s adult son, Derrick, appears to have testified about this marriage at trial. When asked who Otto W. was, Derrick replied, "That *is* my mom's

husband."[13] (Italics added.) Appellant contends "in the context of the testimony regarding [C.W.] and Otto's divorce, this appeared to be a short-hand reference that did not mean [C.W.] and Otto were currently married. All the parties and the trial court assumed throughout trial, including during argument, that [C.W.] and Otto remained divorced." Assuming for the sake of argument that this was the case, it does not change that Derrick disclosed at trial their existing marriage, or at least made a reference suggesting this marriage, for the jury to consider. Furthermore, as appellant also acknowledges, his counsel *did* present evidence and argue at trial that C.W. and Otto W. had a continuing relationship after October 18, 1995. It is not reasonably probable under these circumstances that appellant could have obtained a more favorable result if their 1999 remarriage had been disclosed in further detail at trial.

Appellant's argument that his trial counsel failed to seek further jury instructions regarding felony and misdemeanor false imprisonment also cannot be maintained. As already discussed above, further instructions regarding misdemeanor false imprisonment were not necessary. Therefore, trial counsel made no error. Furthermore, appellant's petition reveals that trial counsel made an informed tactical decision with the range of reasonable competence not to pursue such instructions because of his concern that by doing so, the jury could be more easily persuaded that menace was present. Finally, as already discussed above, the evidence plainly supported a felony false imprisonment conviction. It is not reasonably probable that appellant would have received a more favorable result if the instructions he contends were omitted were actually given to the jury.[14]

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[13] As appellant has requested, we take judicial notice of the record presented to us on appeal for purposes of reviewing his petition for writ of habeas corpus pursuant to *In re Clark* (1993) 5 Cal.4th 750, 798, footnote 35. Petitioner also refers to this particular page of the record in his petition.

[14] Appellant also contends in his petition that he was deprived of his Fourteenth Amendment rights to due process and a fair trial because respondent should have disclosed that C.W. and Otto W. were remarried and living together; did not correct purportedly misleading testimony that suggested they were no longer together or married;

F. Appellant's Waiver Claim Regarding His Prior Convictions is Without Merit

Appellant next argues "for purposes of federal exhaustion of the claim" that his waiver of a jury trial on the facts of his prior convictions was not knowing, intelligent and voluntary, thereby violating his federal constitutional rights, because he was told in open court by his counsel that he did not have the right to a jury determination on the issue of identity. As appellant's own appellate brief indicates, however, the law is clear, and it cannot be maintained that any waiver occurred here. (*People v. Epps* (2001) 25 Cal.4th 19 [defendant does not have a state statutory right to a jury trial on the issue of identity regarding prior convictions]; *Apprendi v. New Jersey* (2000) 530 U.S. 466 [no right to a jury finding regarding the facts of prior convictions which are necessary to increase punishment for an offense].) Accordingly, we reject appellant's jury trial waiver argument.

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and argued to the jury that Otto W. was no longer in the family's household. "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. . . . [W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) We find nothing in the record suggesting that the prosecution withheld information it had about any remarriage. To the contrary, appellant's trial counsel made a statement early in the trial that suggested to the prosecution that he thought Otto and C.W. were presently married. While questioning C.W., he stated, "Well, are Derrick and Otto close persons? In other words, close–is your son–*Otto is your husband.* I don't know if the two of them are related. Is Otto related to Derrick?" (Italics added.) Finally, as we have already discussed, the relationship between C.W. and Otto W. in 1999, four years after the crime, was of very little, if any, relevance. Therefore, we would not find prosecutorial misconduct for nondisclosure or failure to correct testimony under either the federal or state standards. Appellant has waived his right to raise an issue about any prosecution misstatement in closing argument because of his failure to object below, since he was on notice of the existing marriage as a result of Derrick's testimony, as we have already discussed. (*Ibid.*)

G. Appellant Has Waived His Claim That the Trial Court Should Not Have Found That His Prior Conviction for Assault with a Deadly Weapon Was a "Strike"

Appellant next argues that the trial court erred in finding that appellant's prior 1985 conviction in case No. 78470 under Penal Code section 245, subdivision (a)(1) qualified as a "strike" for the purpose of sentencing him under California's "Three Strikes" law. Appellant argues that since the prosecution did not plead that appellant personally used a deadly weapon during the offense or personally inflicted great bodily injury, the trial court should not have found the allegation to be true, and asks that the true finding be vacated. Respondent concedes that this prior conviction was not a basis for a strike and requests that this court modify the judgment to strike this conviction. Assuming for the sake of argument that the parties are correct that this prior conviction did not qualify as a strike, we nonetheless decline to modify the judgment for three reasons.

First, appellant waived his right to raise this issue on appeal. Our Supreme Court has stated, "[I]n essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) Here, appellant has not cited to, and we have not found, anything in the record indicating that he raised his claim to the trial court about the nature of the subject prior conviction; appellant's only opposition to the prosecution's allegations was to challenge the documentation the prosecution submitted to the court. Nor does appellant contend that the court could not sentence appellant as it did even if the court relied only on the eight other "strike" allegations it found to be true.

Furthermore, even if appellant had not waived his argument, appellant has not established that the trial court's finding about case No. 78470 was untrue. As appellant notes, respondent did not plead that appellant personally used a deadly weapon during the offense or personally inflicted great bodily injury, and the court's finding did not state this was the case, as the trial court merely indicated that the convictions were suffered as respondent alleged.

Finally, the record does not establish that the trial court relied on this particular prior conviction to sentence appellant. When it imposed sentence, for example, the court limited its reference to prior convictions to the statement that "[appellant's] prior convictions both as an adult and as a juvenile are numerous." Eight prior strikes, being more than twice what is necessary to impose the sentences involved here, is virtually indistinguishable from nine. Accordingly, we have no reason to modify the court's finding or judgment.

DISPOSITION

We affirm appellant's convictions in their entirety and deny appellant's petition for writ of habeas corpus.

_____
Lambden, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.